No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF FOR RESPONDENT

TIMOTHY C. FOX
Montana Attorney General
DALE SCHOWENGERDT
Solicitor General
Counsel of Record
C. MARK FOWLER
Appellate Bureau Chief
TAMMY A. HINDERMAN
JONATHAN M. KRAUSS
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
DaleS@mt.gov
(406) 444-2026

Counsel for Respondent

February 18, 2016

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Betterman Is Charged With Bail Jumping After Twice Skipping Sentencing on His Domestic Assault Conviction. 2

B. Betterman Attempts to Exploit a Loophole to Avoid an Enhanced Sentence. 3

C. Betterman Demands Dismissal on Speedy Trial Grounds for the First Time at Sentencing. 4

D. The Judge Sentences Betterman After Reviewing His Presentence Investigation Report. 7

E. The Montana Supreme Court Denies Betterman's Claims. 9

SUMMARY OF THE ARGUMENT 13

ARGUMENT 17

I. The Speedy Trial Clause Does Not Apply to Delays in Sentencing the Convicted. 17

A. Sixth Amendment Rights Apply at Different Phases of a Criminal Prosecution Depending on the Purposes They Serve. 17

B. The Original Purpose of the Speedy Trial Clause Was to Incorporate Historical Protections for a Potentially Innocent Person Accused of a Crime. 20

C. The Original Meaning of the Speedy Trial Clause Refers to the Time to Bring the Accused to Trial, Not the Time After Conviction. 24

D. The Speedy Trial Clause's Purposes Protect the Potentially Innocent Accused Awaiting a Fair Determination of His Guilt or Innocence. 29

1. The Clause's Protection Against Undue and Oppressive Pretrial Restraints on Liberty Does Not Apply To Sentencing Delay. 30

2. Pretrial Anxiety and Concern Accompanying Public Accusation Does Not Apply After Conviction. 39

3. Impairment of an Accused's Ability to Defend Himself Does Not Have the Same Application Once Trial Is Over. 41

E. Dismissal Is a Unique Remedy, Which Confirms the Speedy Trial Clause's Limited Application to Pretrial Delay. . . 46

II. The Due Process Clause, Statutory Provisions, and Rules of Criminal Procedure Adequately Protect the Right to Timely Sentencing. 49

III. If the Speedy Trial Clause Applies to Sentencing Delay, Showing Substantial and Demonstrable Prejudice Should Be Required. 51

IV. The State Courts Were Correct That Betterman Did Not Establish a Violation of His Right to a Speedy Trial. 54

CONCLUSION 58

APPENDIX

Relevant Dates In Betterman Prosecution . . . . . App. 1

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) . . . . . *passim*

Arnold v. Jones,
1 F. Cas. 1180, 1 Bee 104 (D.S.C. 1798) 27

Barker v. Wingo,
407 U.S. 514 (1972) . . . . . *passim*

Beavers v. Haubert,
198 U.S. 77 (1905) 54

Blakely v. Washington,
542 U.S. 296 (2004) 10

Bodnari v. State,
839 A.2d 665 (Del. 2003) 53

In re Bonner,
151 U.S. 242 (1894) 47

Bozza v. United States,
330 U.S. 160 (1947) 11, 47

Brady v. Superintendent,
443 F.2d 1307 (4th Cir. 1971) 55

Burkett v. Cunningham,
826 F.2d 1208 (3d Cir. 1987) 52, 53

Burkett v. Fulcomer,
951 F.2d 1431 (3d Cir. 1991) 32, 41, 48

Callan v. Wilson,
127 U.S. 540 (1888) 19

Dickey v. Florida,
398 U.S. 30 (1970) 20, 24, 29

Doggett v. United States,
505 U.S. 647 (1992) 31, 40, 42, 51

Estes v. Texas,
381 U.S. 532 (1965) 42

Flanagan v. United States,
465 U.S. 259 (1984) 39, 40

Greenholtz v. Inmates of Neb. Penal & Correctional Complex,
442 U.S. 1 (1979) 37

Harris v. State,
956 A.2d 1273 (Del. 2008) 54

Herrera v. Collins,
506 U.S. 390 (1993) 29, 30

Hoang v. People,
323 P.3d 780 (Colo. 2014) 53

Jolly v. State,
189 S.W.3d 40 (Ark. 2004) 47, 54

Juarez-Casares v. United States,
496 F.2d 190 (5th Cir. 1974) 48, 54

Klopfer v. North Carolina,
386 U.S. 213 (1967) 20, 29, 51

McDermott v. McDonald,
24 P.3d 200 (Mont. 2001) 37

McMillan v. Pennsylvania,
477 U.S. 79 (1986) 19, 43

Meachum v. Fano,
427 U.S. 215 (1976) 30, 32

Nichols v. United States,
511 U.S. 738 (1994) 43

In re Oliver,
333 U.S. 257 (1948) 19

Perdue v. Commonwealth,
82 S.W.3d 909 (Ky. 2002) 53

Perez v. Sullivan,
793 F.2d 249 (10th Cir. 1986) 32, 40, 52

Petition of Provoo,
17 F.R.D. 183 (D. Md. 1955) 22

Pollard v. United States,
352 U.S. 354 (1957) 47, 49, 54

Smith v. Hooey,
393 U.S. 374 (1969) ..... *passim*

Sparks v. Krueger,
353 P.3d 505 (Mont. 2015) 6

Stack v. Boyle,
342 U.S. 1 (1951) 30

Strunk v. United States,
412 U.S. 434 (1973) 10, 46, 47, 48

Trotter v. State,
554 So.2d 313 (Miss. 1989) 47

United States v. Campbell,
531 F.2d 1333 (5th Cir. 1976) 55

United States v. Ewell,
383 U.S. 116 (1966) ..... *passim*

United States v. Gould,
672 F.3d 930 (10th Cir. 2012) 32, 47, 55, 56

United States v. Gouveia,
467 U.S. 180 (1984) 18

United States v. James,
459 F.2d 443 (5th Cir. 1972) 55

United States v. Lovasco,
431 U.S. 783 (1977) 49

United States v. MacDonald,
435 U.S. 850 (1978) 19

United States v. MacDonald,
456 U.S. 1 (1982) 40, 45

United States v. Marion,
404 U.S. 307 (1971) ..... *passim*

United States v. Nelson-Rodriguez,
319 F.3d 12 (1st Cir. 2003) 52

United States v. Provoo,
350 U.S. 857 (1955) 22

United States v. Ray,
578 F.3d 184 (2d Cir. 2009) ..... *passim*

United States v. Sanders,
452 F.3d 572 (6th Cir. 2006) 44

United States v. Tortorello,
391 F.2d 587 (2d. Cir. 1968) 54

United States v. Washington,
No. 14-10623, 2015 WL 5607653 (5th Cir. Sept. 24, 2015) 48

United States v. Westmoreland,
712 F.3d 1066 (7th Cir. 2013) 52

United States v. Yehling,
456 F.3d 1236 (10th Cir. 2006) 52

Waller v. Georgia,
467 U.S. 39 (1984) 18

Williams v. Jones,
571 F.3d 1086 (10th Cir. 2009) 48

Williams v. New York,
337 U.S. 241 (1949) 43

CONSTITUTION

U.S. CONST. amend. VI ..... *passim*

U.S. CONST. amend. XIV 11, 19

DEL. DECL. OF RIGHTS OF 1776, § 12 23

DEL. DECL. OF RIGHTS OF 1776, § 14 23

MD. CONST. OF 1776, art. XIX 23

MD. CONST. OF 1776, art. XVII 23

MONT. CONST. art. II, § 17 11

MONT. CONST. art. II, § 24 9

PA. CONST. OF 1776, ch. 1, art. IX 23

PA. CONST. OF 1776, ch. 2, § 26 23

VT. CONST. OF 1777, ch. 1, art. X 23

VT. CONST. OF 1777, ch. 2, § XXIII 23

VA. DECL. OF RIGHTS OF 1776, § 8 23

STATUTES

18 U.S.C. § 3142 30

18 U.S.C. § 3143(a) 30

Mont. Code Ann. § 45-7-308(4) 8

Mont. Code Ann. § 46-1-202(18) 3

Mont. Code Ann. § 46-9-106 30

Mont. Code Ann. § 46-9-108 30

Mont. Code Ann. § 46-13-108(1) 3

Mont. Code Ann. § 46-18-101(3)(a) 11

Mont. Code Ann. § 46-18-102(3)(a) 11

Mont. Code Ann. § 46-18-115 11

Mont. Code Ann. § 46-18-401 ..... 8, 38

Mont. Code Ann. § 46-18-501, *et seq.* 3

RULES

Fed. R. Crim. P. 32(b)(1) 49

Fed. R. Crim. P. 32(b) 49

Fed. R. Evid. 1101(d)(3) 43

OTHER AUTHORITIES

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (photo. reprint 1979 (1765-1769)) .. .. *passim*

HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne, trans., 1968) ... 21

Angela Brandt, *No Room at Montana State prison; corrections system overwhelmed*, The Montana Standard, Dec. 7, 2014, available at http://tinyurl.com/hne58qo 33

RICHARD BURN, A NEW LAW DICTIONARY (1792) .. 26

Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. Pa. J. Const. L. 487 (2009) 50

J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (Earle, reprint of 1st ed., 1819) 24, 26, 27, 28

EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (Brooke, 5th Ed. 1797) 21

Habeas Corpus Act, 31 Car. 2, c. 2 (1679) 13, 22

MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (1736) 27

Paul Hammel, *Nebraska prisons failing at rehabilitation programs, report finds*, Omaha World-Herald, Jan. 12, 2014, available at http://tinyurl.com/jgjt8l5 34

Anat Horovitz, *The Emergence of Sentencing Hearings*, 9 PUNISHMENT & SOCIETY 271 ... 25

Kevin Johnson, *Prisoners face long wait for drug-rehab services*, USA Today, Dec. 4, 2012, available at http://tinyurl.com/pdfboam 34

King John's Charter of 1215 21

Magna Carta (1297) ..... *passim*

Proclamation of California Governor, Prison Overcrowding State of Emergency Proclamation (October 4, 2006), available at http://www.gov.ca.gov/news.php?id=4278 . 33, 34

Richard P Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQUENCY 360 (2003) 33

Statute of Gloucester, 6 Edw. 1 (1278) 21

Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998) 43

FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND (2d ed. 1776) 22

United States Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2014* (Sept. 2015) 33

INTRODUCTION

The Speedy Trial Clause protects the presumptively innocent from the harms inflicted by a criminal charge. "This guarantee is an important safeguard to prevent undue and oppressive incarceration *prior to trial*, to minimize anxiety and concern accompanying public *accusation* and to limit the possibilities that long delay will impair the ability of an accused to *defend* himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966) (emphasis added). None of those interests apply *after* a person is convicted of the crime.

Post-conviction delays may have adverse consequences. But they fall within the purview of the Due Process Clause, not the Speedy Trial Clause. The Speedy Trial Clause's history confirms this. Coke, Blackstone, and other jurists who influenced the Framers all tied the right to be brought to trial speedily to the interest in minimizing the damage caused by prosecution of the presumptively innocent.

Distorting the Speedy Trial Clause's purposes to fit sentencing delay would require the Court to rewrite its speedy trial doctrine. A new speedy sentencing rule would demand a new standard for judging post-conviction prejudice and a new remedy to displace the traditional remedy of dismissal for a violation of the Clause. More fundamentally, it risks blurring the critical distinction between the accused and the convicted that the law has recognized since at least Magna Carta, which in turn, would dilute the primary interest that the Speedy Trial Clause has always protected: mitigating the harsh consequences of public accusation on a potentially innocent defendant.

STATEMENT OF THE CASE

A. Betterman Is Charged With Bail Jumping After Twice Skipping Sentencing on His Domestic Assault Conviction.

This case began, ironically, after Petitioner Brandon Betterman twice skipped his sentencing hearing on his felony domestic assault conviction. JA 11. Two months later, Betterman turned himself in. The State charged him with felony bail jumping on March 5, 2012, and he was held at Butte-Silver Bow Detention Center on $10,000 bond. JA 6-9. Betterman did not make bail and remained in jail awaiting sentencing on the domestic assault conviction.[1]

Ten days later on March 15, the judge sentenced Betterman to the custody of the Montana Department of Corrections for five years, but suspended the execution of the last two years of that sentence upon various conditions. JA 42; *see* October 10, 2012 Presentence Investigation Report ("PSI") at 3-4.[2] The judge credited Betterman with the 53 days he had spent in jail prior to his sentencing hearing in that case. Betterman started serving his sentence immediately at the jail, and the judge scheduled his arraignment on the bail jumping charge for April 19. JA 17.

---

[1] A chart containing relevant dates in this matter is included in the Appendix.

[2] The presentence investigation report was added to the Record by motion and order to supplement in the Montana Supreme Court. *See* JA 4-5. The report was not reproduced in the Joint Appendix because it contains confidential information.

B. Betterman Attempts to Exploit a Loophole to Avoid an Enhanced Sentence.

In a conversation with Betterman's attorney the day before the arraignment, the prosecutor indicated his intent to have Betterman sentenced as a persistent felony offender, which is a penalty enhancement based on recidivism. JA 27, 30, 54. *See* Mont. Code Ann. §§ 46-1-202(18) and 46-18-501, *et seq*. The State is typically required to file a notice indicating its intent to seek persistent felony offender status before the pretrial omnibus hearing. Mont. Code Ann. § 46-13-108(1).

Seeing an opportunity, Betterman tried to preempt the State from filing its notice. With the element of surprise in his favor, he immediately pled guilty to felony bail jumping at the arraignment, waiving his right to trial and forgoing the benefit of any plea negotiations with the prosecutor. JA 19-24. The State, nonetheless, filed its notice to designate him a persistent felony offender the same day. JA 25-28.

A week later, Betterman moved to strike the persistent felony offender designation on technical grounds. JA 29-34. Betterman did not assert that he was unaware of the State's intent to treat him as a persistent felony offender, or that he did not meet the statutory definition. Rather, he made the novel claim that his early guilty plea prevented the State from filing a written persistent felony offender notice, and that such notice was a jurisdictional prerequisite.

Betterman consented to the State's request for a 30-day extension to respond. JA 37-40. The Court then heard oral argument and took the matter under advisement. JA 49-52. For reasons not explained by the record, the court's order denying the motion was not issued until five months later, on November 27. JA 53-60. At no time during the interim did Betterman request expedited consideration of his motion or complain about the conditions of his confinement.

C. Betterman Demands Dismissal on Speedy Trial Grounds for the First Time at Sentencing.

The court then set Betterman's sentencing hearing for January 17, 2013. JA 61-62. In the nine months between his April 19 arraignment and his January 17, 2013, sentencing hearing, Betterman made no demand for a faster resolution of his motion, sentence, or judgment, and had not objected to any delay in the case. Rather, he raised the issue for the first time at his sentencing hearing, where he filed a motion to "dismiss the action filed herein on the grounds that he has been deprived of his right to a speedy trial under the Montana and United States Constitutions." JA 63-72. In light of Betterman's motion, the court continued the sentencing hearing and gave the State time to respond. Betterman again did not object. JA 70-72. Betterman never requested that the court sentence him in spite of his motion, set a date for a future sentencing hearing, or expedite consideration of his motion.

Despite Betterman's acknowledgment that he was required to "come forward with evidence tending to establish prejudice," JA 67, his motion was bare-bones, asserting prejudice in just a few short paragraphs. JA 65-66, 68. Without elaboration, he suggested that he could not complete some programs required by the judgment on his domestic assault conviction, that he had "concern and anxiety over his future," that his "rehabilitation had been hampered," and that he was "unable to attend to his misdemeanor matter in Stillwater County." JA 68. He also speculated that he may have been eligible for conditional release if he had not been in jail. JA 65-66. Betterman provided no evidence in support of his motion, not even his own affidavit, and he did not request a hearing to present such evidence.

Surprisingly, Betterman declined to file a reply memorandum in support of his motion. Nor did he inform the court that the motion was ripe for consideration once the State's response was received, or request oral argument, as permitted by local rule. In mid-March, nearly two months after Betterman filed his motion to dismiss, the State and Betterman's attorney jointly contacted the judge's judicial assistant for an update on the status of the motion and were informed that it would be decided in due course. *See* JA 90.

The district court denied Betterman's speedy trial motion on April 29, about three months after he filed it. Pet. App. 26a-37a. In denying the motion, the district court applied this Court's test from *Barker v. Wingo*, 407 U.S. 514 (1972), finding that the delay was attributable to both the court and to Betterman and not

the product of bad faith, that Betterman had failed to assert his right before sentencing, and that he had failed to support his prejudice claims. Pet. App. 32a-37a.

Although Montana law does not recognize "a motion to reconsider because no such motion exists," *Sparks v. Krueger*, 353 P.3d 505 (Mont. 2015), Betterman filed one anyway a week after the judge denied his motion to dismiss. JA 84-85. For the first time, he also submitted his own affidavit in an attempt to substantiate his prejudice claims. JA 86-90. Because he filed the affidavit after the judge denied his first motion, the State never had an opportunity to respond or cross-examine him. Many of Betterman's allegations were just longer reiterations of the claims raised by counsel in his motion. JA 87. But he also added new prejudice claims, including complaints about outdoor recreation and medical care at the jail. He also alleged that he had sought counseling while in jail for anxiety and depression related to the delay in his sentencing, even though he had received counseling at the jail throughout his incarceration starting as early as April 2012—long before any delay in this case. JA 87-88; *see* PSI at 6.

The district court denied the motion to reconsider on June 18. Pet. App. 24a-25a; JA 91-111. At his June 27 sentencing hearing, Betterman testified about the assortment of rehabilitation programs and mental health counseling that the county jail had provided him, which seemed to contradict much of the testimony in his speedy trial affidavit:

> Counsel: Since you've been in custody, have you availed yourself of any of the programs in the jail?
>
> Betterman: I have. I went through two courses of the chemical dependency and completed both of them. I completed the anger management course with the Western Montana Mental Health. I've got on some anxiety pills and whatnot and done a lot of hard work with [counselors] Bill Keller and Kathy Davis in the mental health.

JA 98; *accord* PSI at 5-6.

He also testified that jail had kept him from "the temptations of the street" and that "[c]oming to jail saved my life. I'll admit that." JA 101-02. Also in contrast to the statements he made in his affidavit, he told the presentence investigator that his health was "good stating he has lower back pain on occasion" and that he did not have "any physical or other disabilities." PSI at 6-7. He recognized that the chemical dependency course he had completed at jail helped him to "see what alcohol does to me." PSI at 5. And although he had also been prescribed medication for mental health issues, he had elected to discontinue it. PSI at 6.

D. The Judge Sentences Betterman After Reviewing His Presentence Investigation Report.

The presentence investigation report recommended that the court sentence Betterman to serve five years in prison, with no portion of the sentence suspended. PSI at 8; JA 93, 95. Alternatively, the presentence investigation report recommended that Betterman

serve a seven-year prison sentence, with no portion suspended, if the court designated Betterman a persistent felony offender. PSI at 8; JA 94. The report also recommended that the sentence run consecutive to his domestic assault sentence, which is the default for multiple offenses. PSI at 8; JA 94. *See* Mont. Code Ann. § 46-18-401. The sentencing recommendation was based on Betterman's "long criminal history, blatant disregard to his rules of supervision and Court orders," and because of his history of drug and alcohol abuse without rehabilitation. PSI at 7-8; JA 94.

The judge chose to impose a shorter term of incarceration, followed by a probationary term. He sentenced Betterman to serve a seven-year prison sentence, but suspended the last four years of that sentence without designating Betterman as a persistent felony offender. JA 106, 111, 114. Thus, the judge chose not to sentence Betterman to a harsher sentence than the one affixed to the crime of bail jumping. Mont. Code Ann. § 45-7-308(4) (maximum sentence for felony bail jumping is ten years in prison). In accord with the presentence investigation report recommendation and the default rule, the judge ordered the bail jumping sentence to run consecutively to the sentence Betterman was already serving on his domestic assault conviction. JA 106, 114. And because Betterman was already serving time on that prior conviction while he was in jail awaiting sentencing, the judge did not credit that time toward his bail jumping conviction. JA 111, 114.

E. The Montana Supreme Court Denies Betterman's Claims.

On direct appeal, the Montana Supreme Court affirmed Betterman's conviction and sentence, upholding the district court's denial of his motion to dismiss for undue delay in sentencing. Pet. App. 1a-23a. Betterman asserted on appeal that his right to a speedy trial under the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution included the period from the date of his guilty plea until the date of his sentencing. *Id.* at 5a.

Betterman faulted the district court for not amending the *Barker* factors to apply to post-trial delay. Specifically, Betterman contended that the district court erred by focusing on the prejudice prong. *See* JA 5 (Br. of Appellant at 34) (lamenting that the *Barker* "factors available to district courts to assess prejudice from a delay are specifically crafted to assess prejudice from *pre-trial* delay") (emphasis added); *see also* JA 5 (Br. of Appellant at 11) ("The district court evaluated the prejudice to [Betterman] against the three *pre-trial* interests identified in *Barker*. Not surprisingly, the district court incorrectly concluded that [Betterman] suffered no prejudice.") (emphasis in original).

The Montana Supreme Court held that the constitutional right to a speedy trial does not apply after a defendant's guilt has been established either by a guilty verdict after trial or by the court's acceptance of the defendant's guilty plea. Pet. App. 14a-15a, 23a. The court observed the distinctions between trial and sentencing, noting the principles identified by this

Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), "separating the trial establishing guilt from the imposition of penalty." *Id.* at 8a-9a. These distinctions are mirrored in Montana's statutory scheme, which separates the trial phase of a criminal prosecution from the sentencing phase, and are embodied in definitions of the terms "trial" and "sentence." *Id.* at 10a. Further, the text of the state and federal constitutional provisions expressly identify the protections due in the context of a "*trial*." *Id.* (emphasis in original).

The Montana Supreme Court also distinguished the interests that the constitutional speedy trial right was designed to protect as manifestly different from the interests of a convicted defendant in being sentenced without undue delay. Pet. App. 11a-13a. The latter concerns, the court found, "are compelling, but nevertheless ill-suited for remediation through the constitutional right to speedy trial." *Id.* at 13a. Though a criminal prosecution encompasses sentencing and the prosecution may not terminate until sentence is imposed, this proposition has no bearing on when a trial terminates. *Id.* "'Trial' is not synonymous with 'prosecution.'" *Id.*

Finally, the court noted that the only remedy for a speedy trial violation is dismissal of the charges. Pet. App. 14a (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). In contrast, courts may remedy a sentencing error in a number of ways because, as this Court has explained, a defendant whose guilt has been established should not "escape punishment altogether, because the court committed an error in passing sentence." Pet. App. 14a (internal quotations omitted)

(citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)). The Montana Supreme Court reasoned that "[i]f the constitutional speedy trial right extends through sentencing, then these two remedial doctrines conflict. To construe them consistently, we must find that the constitutional speedy trial right does not include sentencing and that therefore a delay in sentencing does not warrant dismissal of the charges." Pet. App. 14a. Hence, the court concluded the right to a speedy trial did not apply to the delay between the entry of Betterman's guilty plea and his sentencing hearing.

Although the Sixth Amendment right to speedy trial was inapplicable, the Montana Supreme Court held that a criminal defendant has a constitutional right to be sentenced without unreasonable delay under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, Section 17, of the Montana Constitution. Pet. App. 15a-20a, 23a. The Montana Legislature has codified the due process interest in reasonably timely sentencing in several statutory provisions. *Id.* at 16a-17a (citing Mont. Code Ann. § 46-18-101(3)(a) ("Sentencing and punishment must be certain, timely, consistent, and understandable."); § 46-18-102(3)(a) ("[I]f the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time."); § 46-18-115 ("[T]he court shall conduct a sentencing hearing without unreasonable delay[.]")).[3] The court found that these prohibitions, taken together with the protection against unfair treatment in criminal proceedings

---

[3] Betterman, however, failed to raise a statutory claim under these provisions. Pet. App. 7a, 17a, 22a-23a.

guaranteed by the Due Process Clause, adequately protect a criminal defendant from unreasonable delay between conviction and sentencing. Pet. App. 16a-17a.

The Montana Supreme Court recognized that whether there has been an unreasonable sentencing delay in violation of due process depends upon the circumstances of each case, and requires consideration of two related factors: (1) the reasons for delay and (2) the prejudice to the defendant. Pet. App. 17a-18a. The court found that neither factor is dispositive. If the reasons for a delay are less than purposeful, or if the prejudice caused by the delay is less than oppressive, there may still be a constitutional violation when these two considerations are balanced against one another. *Id.* at 19a-20a.

In analyzing these due process considerations, the court found that the 14-month delay in Betterman's sentencing, while unacceptable, was not purposeful. Pet. App. 20a, 23a. It also held that a due process claim of sentencing delay required that allegations of prejudice be substantial and demonstrable. It found that Betterman's prejudice claims did not meet that standard because they were based on speculation. *Id.* at 21a-23a. The court held that, on balance, the delay did not warrant finding a due process violation. *Id.* at 22a.

SUMMARY OF THE ARGUMENT

This Court looks to the purposes served by a Sixth Amendment right to determine when it applies. Although textually linked, the right to a "public" trial, the right to a "speedy" trial, and the right to a trial "by an impartial jury" apply at different phases of a criminal prosecution, based on the purposes that they serve. The purpose of the Speedy Trial Clause is to mitigate the consequences of public accusation on a presumptively innocent defendant awaiting a fair determination of guilt or innocence. That purpose does not apply to sentencing delay.

The Speedy Trial Clause's antecedents support the Court's description of the right as protecting pre-trial interests of the accused based on the presumption of innocence. Sir Edward Coke described Magna Carta as guaranteeing that persons accused of a crime should not be "detained long in prison before they were called to answer," so that "the innocent [will] not be worn and wasted by long imprisonment" prior to trial. That same principle was reflected in the Habeas Corpus Act of 1679, which, along with Magna Carta, served as the foundation for the Bill of Rights.

It is equally clear that when the Framers drafted the Bill of Rights, trial and sentencing were distinct phases of a criminal prosecution, and a person merely accused of a crime could be, and was, treated differently than a person convicted of one. While the jury determined the truth of the accusations against the accused, the court at sentencing exercised discretion within statutory limits to determine the appropriate punishment for the convicted. And while an accused prior to trial was presumed innocent and

generally entitled to be released on bail, a convicted defendant labored under "the strongest presumption of guilt" and would be detained pending sentencing. Given these distinctions, it would have been generally understood at the time of ratification that the right of the accused to a speedy trial applied through the jury's determination of his guilt, and no further.

In accord with that history, this Court has always described the purpose of the Speedy Trial Clause as ensuring that the accused is brought to trial speedily to minimize the harms of public accusation. "This guarantee is an important safeguard to prevent undue and oppressive incarceration *prior to trial*, to minimize anxiety and concern accompanying public *accusation* and to limit the possibilities that long delay will impair the ability of an accused to *defend* himself." *Ewell*, 383 U.S. at 120 (emphasis added). But once a defendant is convicted, the presumption of innocence no longer applies. Nor do the three interests that undergird the right to a speedy trial.

1. Upon conviction, a defendant does not have the same liberty interest as someone merely accused of a crime. Betterman's claims regarding undue oppression—the conditions he suffered while awaiting sentencing in a local jail, speculation about parole, and speculation about concurrent sentencing—are not the type of harm the Speedy Trial Clause was meant to remedy. Moreover, each of them is based on speculation and has no support in this Court's precedents.

2. The same can be said for Betterman's argument about anxiety and concern. The Speedy Trial Clause is concerned with lessening the anxiety of the accused who is presumptively innocent and must live under a

"cloud of suspicion" until the charges are resolved. After conviction, guilt has been established and punishment is certain. That may raise a certain amount of anxiety, but it is not the type the Sixth Amendment is intended to mitigate.

3. Nor does sentencing delay impact the ability of an accused to defend himself at trial. Long delay before trial can impact a fair determination of guilt because witnesses and evidence can become stale or unavailable. Sentencing proceedings are not like trial in any regard, and the prevalence of guilty pleas makes them particularly uneventful, as does this Court's decision in *Apprendi*, which removed an entire category of facts addressed at sentencing. Moreover, Petitioner's argument that the same interest applies after trial would not preclude extending speedy trial claims through appeal and re-sentencing.

The "only possible remedy" for a speedy trial violation—dismissal of the charges—further confirms that the Clause is limited to pretrial delay. That remedy makes sense when applied to the harms associated with public accusation, including potential prejudice to the defense and unjustified deprivation of liberty. But it does not make sense in the context of sentencing delay, and not even Petitioner advocates dismissal as a remedy.

But just because the Speedy Trial Clause is inapplicable to sentencing delay does not leave a defendant without recourse. Various state and federal laws prohibit sentencing delay. And this Court has already held that the Due Process Clause has a role to play in protecting against oppressive delay in criminal proceedings. Due process provides courts with the

flexibility to tailor a cure that fits the prejudice that a defendant suffers, and avoids skewing the purposes of the Speedy Trial Clause to fit sentencing delay.

If the Court decides that the Speedy Trial Clause does apply to sentencing, it should clarify that a defendant must show substantial and demonstrable prejudice from the delay and that vacating the defendant's conviction is not the appropriate remedy to cure any such prejudice. Doing so recognizes that after conviction society's interests in deterrence, public safety, and retribution increase, while the speedy trial interests of the convicted fade or disappear. Moreover, without requiring substantial and demonstrable prejudice, courts would be left without a standard for remedying harm associated with sentencing delay because there would be nothing concrete to remedy.

Finally, even under the modified *Barker* test that Petitioner advocates, the lower courts were correct that the delay in sentencing did not violate his rights. The length of delay was not substantial given that other courts have rejected speedy sentencing claims that were much longer. Much of that delay was due to Betterman's procedural tactics, and in any event, even he admits that it was not purposeful. The first time he asserted his right to be sentenced more quickly was when he filed his motion to dismiss, which indicates the weakness of his claim. That is further confirmed by his failure to substantiate any of his speculative claims that the delay prejudiced him.

ARGUMENT

I. The Speedy Trial Clause Does Not Apply to Delays in Sentencing the Convicted.

This Court looks to the purpose served by a Sixth Amendment right to determine when it applies. History and this Court's precedents confirm that the Speedy Trial Clause has one abiding purpose: to mitigate the consequences of public accusation on a presumptively innocent defendant awaiting a fair determination of his guilt or innocence. That distinctly pretrial interest does not apply to a convicted defendant awaiting sentencing.

Moreover, the "only possible remedy" for a speedy trial violation—dismissal of the charges—further confirms its limitation to pretrial delay. *Barker*, 407 U.S. at 522. Not even Petitioner defends awarding that remedy to a convicted defendant whose sentencing was unduly delayed. The Court should reject his invitation to wrench the Speedy Trial Clause from its proper context by extending it to protect the guilty from uncertainty over the punishment for their crimes.

A. Sixth Amendment Rights Apply at Different Phases of a Criminal Prosecution Depending on the Purposes They Serve.

The Sixth Amendment guarantees, among other things, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." There are three distinct rights implicated by this portion of the Sixth Amendment: the right to a "public" trial, the right to a "speedy" trial, and the right to a trial "by an impartial jury." Although these rights are textually linked, the Court's decisions

demonstrate that they—like other Sixth Amendment rights—do not all apply at the same phases of criminal proceedings.

To determine when a Sixth Amendment right applies, the Court looks to the "literal language of the Amendment," requiring both a "criminal prosecution" and an "accused," and "the purposes which we have recognized that the right . . . serves" based on the Clause's history. *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984) (citation omitted). Although the right to a public trial and the right to a speedy trial are textually linked, these rights serve different purposes. *Compare Ewell*, 383 U.S. at 120 (the purposes of the speedy trial right are "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself"), *with Waller v. Georgia*, 467 U.S. 39, 46-47 (1984) (the purposes of the public trial right are to ensure that a defendant is dealt with fairly, discourage perjury, and encourage witnesses to come forward). Thus, the speedy trial right attaches when the government restricts a person's pretrial liberty by arrest, or upon formal accusation, *United States v. Marion*, 404 U.S. 307, 319-21 (1971), while the "public" trial right does not attach until the trial itself, or at certain pretrial suppression hearings. *Waller*, 467 U.S. at 46-47.

Betterman's argument that the rights to a "public" trial and a "speedy" trial should apply co-extensively simply because they are "textually interwoven," Pet. Br. 10, 16-17, misses the point and is incorrect for at least three additional reasons.

First, the right to a trial "by an impartial jury" is every bit as "textually interwoven" as the rights to a "public" and "speedy" trial. But while the Sixth Amendment includes the "right of trial by jury in criminal prosecutions," *Callan v. Wilson*, 127 U.S. 540, 550 (1888), "there is no Sixth Amendment right to jury sentencing," *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986). The Court in *Apprendi* further clarified the distinction between a jury's role in finding facts that increase the penalty beyond the statutory maximum, and the judge's role in imposing judgment at sentencing. *Apprendi*, 530 U.S. at 482-83, 490.

Second, Betterman misreads *In re Oliver,* 333 U.S. 257, 266-73 (1948), for the proposition that "this Court has already held that the textually interwoven right to a *public* trial applies at sentencing. . . ." Pet. Br. 10, 16-17. The Court has held no such thing. *In re Oliver* held that charging, trying, and convicting a defendant of contempt in secret deprived him "of his liberty without affording him the kind of notice, opportunity to defend himself, and trial which the due process clause of the Fourteenth Amendment requires." 333 U.S. at 260-61, 278. The case scarcely dealt with sentencing at all.

Third, while the public trial right has its fullest application at the actual trial proceedings, the "speedy" trial right does not even apply to the trial itself. "It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial." *United States v. MacDonald*, 435 U.S. 850, 861 (1978)). That is why Betterman's repeated assertion that the Speedy Trial Clause applies to "delays in the course of pretrial proceedings, not just in the narrow confines of the petit jury trial," is beside the point. Pet. Br. at 10;

see also Pet. Br. 15-16. The Court has never indicated that the accused has a right to have the trial take a short time; rather, the Clause protects "the right to be *brought to trial* speedily." *Marion*, 404 U.S. at 328 (Douglas, J., concurring) (emphasis added). The "public" trial right, however, unquestionably applies throughout the trial itself.

Thus, simply because the right to a public trial and a speedy trial are textually linked does not answer the question that this case presents. As discussed below, the Speedy Trial Clause's history confirms that its purpose to avoid long delay in bringing a presumptively innocent defendant to trial does not apply to delays in sentencing.

B. The Original Purpose of the Speedy Trial Clause Was to Incorporate Historical Protections for a Potentially Innocent Person Accused of a Crime.

The roots of the accused's right to a speedy trial can be traced to Magna Carta, "the very foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). Those historical roots indicate that the purpose of the right is "to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay" in determining the truth of the accusations against him. *Dickey v. Florida*, 398 U.S. 30, 41 (1970) (Brennan, J., concurring). That this purpose does not apply to sentencing and judgment is borne out by the historical evidence.

Sir Edward Coke read Magna Carta as guaranteeing that persons accused of crime should not

be "detained long in prison before they were called to answer," so that "the innocent [will] not be worn and wasted by long imprisonment" prior to trial. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 315 (Brooke, 5th Ed. 1797) (discussing the Statute of Gloucester (1278) and Magna Carta c. 26, 29 (1297) (c. 36, 39-40 of King John's Charter of 1215)); *see also* 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 346 (Samuel E. Thorne, trans., 1968) (discussing Magna Carta's concern with the "inequit[y] that the innocent as well as the guilty be kept in prison for a long time" before trial). Or, stated conversely, Coke believed that an accused was entitled to "speedily come to his triall," COKE at 315, so that the falsely accused could "have justice, and right for the injury done to him"—the unwarranted prior restraints on his liberty—"speedily without delay." COKE at 55; *see also* COKE at 42 (praising the practice whereby the justices of oyer and terminer and of jail delivery "came at the least into every county twice every year" to clear the jails and preside over criminal cases because they provided "full and speedy justice, *by due triall*, without detaining [persons accused of crime] long in prison.").

Thus, Coke directly linked a potentially innocent accused's right to obtain "full and speedy justice" in the form of release from any unwarranted restraints on his liberty to the government's obligation to bring the accused "speedily . . . to his triall." Other notable jurists of the eighteenth-century agreed. In his commentary on chapter 29 of the 1297 Magna Carta, famed Irish jurist Francis Stoughton Sullivan made the same connection, explaining that in criminal prosecutions, unlike in civil matters, judges are obliged

"to proceed with expedition, and to suffer no delays, but such as the law allows," and the prosecution cannot "put off" the trial of a person accused of a crime without showing "good cause" because "every man accused has a right to be brought to his trial" without undue delay. FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND 378-79 (2d ed. 1776).

Similarly, Blackstone drew a straight line between chapter 29 of Magna Carta and the Habeas Corpus Act of 1679. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130-31 (photo. reprint 1979 (1765-1769)). He referred to the Act as the "second magna carta, and stable bulwark of our liberties." 1 BLACKSTONE at 133. The Habeas Corpus Act, in turn, also tied the desire to obtain "more speedy reliefe" for accused felons to the government's obligation to bring an accused to trial within a specified period of time. Habeas Corpus Act, 31 Car. 2, c. 2 (1679) (requiring the release of any person accused of a crime not "indicted and tried" by a jury before the expiration of two terms of the court in which the case was being heard). The Habeas Corpus Act served as a template for similar laws and constitutional provisions in most of the States that eventually ratified the Bill of Rights. *See Petition of Provoo*, 17 F.R.D. 183, 197 n. 6 (D. Md. 1955), *aff'd sub nom. United States v. Provoo*, 350 U.S. 857 (1955) (citing state habeas statutes and cases interpreting the same), *cited in Marion*, 404 U.S. at 314 n.6.

It was in this historical context that George Mason and James Madison declared in the first state bill of rights, "[t]hat in all capital or criminal prosecutions a man has a right . . . to a speedy trial by an impartial

jury[.]" VA. DECL. OF RIGHTS OF 1776, § 8. The citizens of Delaware, Maryland, Pennsylvania, and Vermont followed suit, and explicitly granted persons accused of a crime the right to a "speedy trial" as well. *See* DEL. DECL. OF RIGHTS OF 1776, § 14; MD. CONST. OF 1776, art. XIX; PA. CONST. OF 1776, ch. 1, art. IX; VT. CONST. OF 1777, ch. 1, art. X.

Notably, all four of these latter documents also contained provisions regarding the speedy administration of justice. DEL. DECL. OF RIGHTS OF 1776, § 12 "every freeman, for . . . injury done him . . ought to have remedy . . . and ought to have justice and right . . . speedily without delay"); MD. CONST. OF 1776, art. XVII (same); PA. CONST. OF 1776, ch. 2, § 26 ("All courts shall be open, and justice shall be impartially administered without . . . unnecessary delay"); VT. CONST. OF 1777, ch. 2, § XXIII (same). The drafters of these early state constitutions, thus, differentiated between the right of an accused to a speedy trial and the right of all persons to access the courts to obtain speedy justice for civil injuries. Had they concluded that the latter, more generic provisions were sufficient to guarantee speedy sentencing hearings, as Betterman contends, there would have been no need to provide the separate guarantees of the right to a speedy trial in criminal prosecutions. Yet they did.

In any event, the Framers of the Bill of Rights explicitly chose not to include a generic "speedy justice" provision, and instead chose to explicitly guarantee that "in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury[.]" Given the historical context in which these words were chosen, this Court has held that the

Speedy Trial Clause should be read to mean exactly what it appears to say: "that those accused of crimes would have their trial without undue delay," *Marion*, 404 U.S. at 314 n.6, and that such persons have the right to be "brought to trial speedily." *Id.* at 328 (Douglas, J., concurring). It thus guarantees "the right to a prompt inquiry" into the truth of the accusations against the accused, and imposes a corresponding duty on the government "to provide a prompt trial" for that purpose. *Dickey*, 398 U.S. at 38.

C. The Original Meaning of the Speedy Trial Clause Refers to the Time to Bring the Accused to Trial, Not the Time After Conviction.

The Speedy Trial Clause, by its own terms, is the right of a person "accused" of a crime to a speedy "trial." Anyone with a basic familiarity with the criminal justice system at the time that the Bill of Rights was ratified would have understood these words as guaranteeing an accused the right to be brought to trial for a determination of his guilt or innocence without undue delay, and no more.

In the late eighteenth century, it was well understood that "[t]he formal proceedings of the trial [came] to a close" upon the receipt of the jury's verdict finding the defendant guilty or not guilty. 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 437 (Earle, reprint of 1st ed., 1819). The court's imposition of judgment was a separate "stage" of a criminal prosecution "after trial and conviction are past," 4 BLACKSTONE at 368, which occurred at a different time than the receipt of the verdict. 1 CHITTY at 456-57. *See also* Pet. Br. App. (indicating the imposition of

judgment rarely occurred immediately upon the receipt of the jury verdict, although it did occur within a short number of days generally).

The court's imposition of judgment was separate from, and involved very different considerations than, the jury's determination of "the truth of every accusation" against the accused. *Apprendi*, 530 U.S. at 477 (citing 4 BLACKSTONE at 343); *see also* 4 BLACKSTONE at 390 (punishment unquestionably takes into consideration "the situation and circumstances of the offender," not just the facts of the offense). While the sentence attached to a given crime was statutorily-determined and many felonies carried the penalty of death at the time, only about 20 percent of those convicted of capital offenses were actually executed during the eighteenth century. Anat Horovitz, *The Emergence of Sentencing Hearings*, 9 PUNISHMENT & SOCIETY 271, 276; *see also* 4 BLACKSTONE at 18-19 ("judges, through compassion, [would] respite one half of the convicts, and recommend them to the royal mercy"). That is because judges exercised great discretion in determining the sentences actually imposed on defendants through other means, including pardons and grants of the benefit of the clergy. Horovitz at 276-77.[4] As such, the Framers, and, indeed,

---

[4] *See also* 4 BLACKSTONE at 364-65 (explaining the court was required to discharge the capital punishment attached to many felonies for first-time offenders and order the convict to be "burnt in the hand, imprisoned for a year, or less, or . transported [to America] for seven years, if the court think proper"); 4 BLACKSTONE at 387 (discussing pardons and the factors that might

any person familiar with criminal procedure at the time, would have understood that the sentence and judgment that would ultimately be imposed for any given crime, even a so-called capital offense, was not preordained by the jury's verdict alone.

Betterman contends that the Sixth Amendment's guarantee of a speedy trial necessarily incorporated the right to a speedy sentencing because in colonial times, "trial was often used to refer to criminal proceedings in general," and not solely to the portion of the criminal prosecution from the selection of the jury through the jury's determination of the truth of the accusations against the accused. Pet. Br. 22. But even Betterman concedes, as he must, that there is ample evidence in the historical record whereby the word "trial" was used in the latter, pre-conviction sense only. Pet. Br. at 26. *See, e.g.*, RICHARD BURN, A NEW LAW DICTIONARY 697 (1792) (defining a "trial" as "the examination of the matter of fact in issue."); 1 CHITTY at 437 ("[t]he formal proceedings of the trial [came] to a close" upon the receipt of the jury's verdict); 4 BLACKSTONE at 368 (describing judgment as "the next stage of criminal prosecution, after trial and conviction are past"); *United States v. Ray*, 578 F.3d 184, 195-96 (2d Cir. 2009) (collecting early decisions of American courts using "trial" in this manner).

Indeed, because it was generally understood that the "trial" was complete upon the receipt of the jury's verdict, a convicted defendant could file a motion for a

---

justify a pardon, including the severity of the crime and "any favourable circumstances [that] appear in the criminal's character"); 1 CHITTY at 458-63, 481 (describing these procedures).

"new trial" after his conviction and prior to the court's imposition of the judgment. *See Ray*, 578 F.3d at 195-96; *Arnold v. Jones*, 1 F. Cas. 1180, 1180, 1 Bee 104 (D.S.C. 1798) (explaining the practice at common law was to require motions for new trial to be filed before judgment); *see also* 1 CHITTY at 449.

Sentencing assuredly was connected to the determination of the accused's guilt by the jury, just as it is today. But even during colonial times, the two processes were separate and involved different considerations. And it was the trial—the determination of the accused's guilt or innocence—that became the subject of the Speedy Trial Clause.

That the right to a speedy trial belongs to the "accused," and not to the already convicted, is additional evidence that the Speedy Trial Clause applies through conviction and not after. At the time that the Bill of Rights was ratified, a person could be informally "accused" and arrested upon an allegation or suspicion that he had committed a serious offense, even though no formal accusation yet been made. *See* 4 BLACKSTONE at 286-87 (citing 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 108-09 (1736)); 4 BLACKSTONE at 298 (discussing methods of formal accusation). But the accused was generally entitled to be released from custody on bail pending trial. 4 BLACKSTONE at 293-96. And, if bail was unavailable or the accused was unable to post bail, he could be imprisoned "only for safe custody, and not punishment" because the truth of the accusation against him had not yet been established. 4 BLACKSTONE at 297.

A guilty verdict or confession changed all of that. The accused was no longer merely accused; he was

"then said to be convicted of the crime whereof he stands indicted." 4 BLACKSTONE at 355; *see also* BURN at 178 (defining "conviction" as "when the party upon his trial is found guilty of the charge laid against him; and this may be two ways, either by confessing the offence, or being found guilty upon evidence"). At that point, any presumption of innocence was lost, and, in its place, "the strongest presumption" of guilt attached, 1 CHITTY at 498, and the convicted person would be remanded to prison without bail for any interval between verdict and judgment. 1 CHITTY at 456-57.

These distinctions—between trial and sentencing or judgment, and between the accused and the convicted—show the Speedy Trial Clause originally would have been understood as guaranteeing only a person accused of a crime the right to a speedy adjudication of his guilt or innocence. It would not have been understood to include the right to a speedy sentencing, let alone a speedy execution of that sentence. *See* Pet. Br. 22 n.1 (suggesting the execution of the punishment imposed at sentencing must be swift). That understanding fit perfectly with the historical purpose undergirding similar legal provisions dating back to Magna Carta: to protect the potentially innocent accused from long suffering the negative consequences associated with public accusation. And, as shown below, it fits perfectly with this Court's understanding of the purposes undergirding the Speedy Trial Clause itself.

D. The Speedy Trial Clause's Purposes Protect the Potentially Innocent Accused Awaiting a Fair Determination of His Guilt or Innocence.

This Court has consistently articulated the Speedy Trial Clause's fundamental, but specific, interest as the right of an accused to avoid "prolonged detention without trial," and to ensure "those accused of crimes would have their trial without undue delay." *Klopfer*, 386 U.S. at 224; *Marion*, 404 U.S. at 314 n.6. The purposes for the right have always concerned mitigating the consequences of public accusation on the potentially innocent defendant who is awaiting a fair determination of guilt or innocence. *See Dickey*, 398 U.S. at 41 (Brennan, J., concurring). "This guarantee is an important safeguard [1] to prevent undue and oppressive incarceration *prior to trial*, [2] to minimize anxiety and concern accompanying public *accusation*, and [3] to limit the possibilities that long delay will impair the ability of an *accused to defend himself*." *Ewell*, 383 U.S. at 120 (emphasis added). These interests do not apply to a defendant after conviction.

The principle that underlies these purposes is that "[a] person when first charged with a crime is entitled to a presumption of innocence, and he may insist that his guilt be established beyond a reasonable doubt." *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Arrest for any charge is a significant event that can pose serious threats to the rights of the accused. To legally arrest someone, the government must only assert probable cause to believe that the accused committed a crime, which impacts the person's freedom even if on bail, disrupts employment, curtails associations with family

and friends, and drains financial resources. *Marion*, 404 U.S. at 320. And until pending charges are resolved at trial, the accused must live under a "cloud of suspicion." *Barker*, 407 U.S. at 534. "Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent." *Id.* at 533.

But someone convicted of a crime does not stand in the same shoes. "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera*, 506 U.S. at 399. So do the three core interests that undergird the right to a speedy trial.

1. The Clause's Protection Against Undue and Oppressive Pretrial Restraints on Liberty Does Not Apply To Sentencing Delay.

Because a person convicted of a crime is no longer presumed innocent, he "has been constitutionally deprived of his liberty to the extent that the State may confine him." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). That explains why bail is presumptively available for the accused awaiting trial, but presumptively unavailable for a convicted person awaiting sentencing. "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *see* 18 U.S.C. § 3142 (bail typically available to accused awaiting trial); Mont. Code Ann. §§ 46-9-106, -108 (same). But once a person has been convicted, the presumption flips. *See* 18 U.S.C. § 3143(a) (providing

that a court should order detention of a defendant pending sentencing unless the court "finds by clear and convincing evidence" that the defendant will be neither a flight risk nor a danger to any person in the community"). Thus, delay in sentencing a convicted defendant does not involve the same risk of "oppressive pretrial incarceration" that gives rise to speedy trial concerns when a *potentially innocent* defendant is awaiting adjudication of his guilt or innocence. *See Doggett v. United States*, 505 U.S. 647, 654 (1992)(citing *Barker*, 407 U.S. at 532).

Betterman seems to acknowledge as much by recharacterizing this purpose as the mere prevention of "undue oppression." *See* Pet. Br. 35. But "undue oppression" associated with a convicted defendant's time spent serving a lawful sentence for his crime is not the evil that the Framers intended the Sixth Amendment to prevent, nor is it the type of prejudice that this Court has ever recognized when interpreting that provision. Thus, Betterman's claims regarding undue oppression—the conditions he suffered while awaiting sentencing in a local jail, speculation about parole, and speculation about concurrent sentences—do not qualify as the type of harm that implicates the Speedy Trial Clause.

a. Awaiting sentencing in county jail is not undue or oppressive pretrial incarceration. Betterman would have this Court reduce the Speedy Trial Clause's purpose in preventing "undue and oppressive incarceration prior to trial" to an analysis of the comparative amenities of prison over jail for someone awaiting sentencing. But this Court has already rejected the idea that the differences in penal

institutions can be a basis for a constitutional challenge. *See Meachum*, 427 U.S. at 225, 228 (rejecting due process claim based on more favorable living conditions in one prison over another). As the Tenth Circuit put it, "[t]he benefits arguably available to a defendant in the penitentiary are entirely speculative not only concerning whether he would have qualified, but also concerning the extent to which he would have participated or benefited." *Perez v. Sullivan*, 793 F.2d 249, 257 (10th Cir. 1986); *see also United States v. Gould*, 672 F.3d 930, 939-40 (10th Cir. 2012)(holding that claim that conditions in one penal institution compared to another was speculative and could not constitute prejudice under *Barker*); *Burkett v. Fulcomer*, 951 F.2d 1431, 1449 (3d Cir. 1991) (*Burkett II*) (Alito, J., dissenting) ("I would hold that differences between penal institutions can rarely, if ever, provide a basis for finding prejudice under *Barker*. Otherwise, the federal courts will have to start to compile comparative rankings of jails and prisons[.]").

Betterman's case is no different than most, and the interests he raises are highly speculative. At his sentencing hearing, the only testimony he gave about jail was to laud the assortment of rehabilitation programs and counseling he received and to note that "jail saved my life," his later statements to the contrary notwithstanding. JA 98-99, 101-02. Other than Betterman's contradictory testimony, his criticism of jail versus prison is based primarily on the comparative availability of rehabilitation programs and this Court's 1972 decision in *Barker*, generally describing local jails at the time. Pet. Br. at 35-38.

But the distinctions between jail and prison have changed substantially since the Court decided *Barker*. State and federal prisons are notoriously overcrowded, and Montana is no exception. *See* Angela Brandt, *No Room at Montana State prison; corrections system overwhelmed*, The Montana Standard, Dec. 7, 2014 (describing overcrowding in Montana prison system);[5] United States Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2014* at 11-12 (Sept. 2015) (listing the prison systems in 19 states, including Montana, and the federal government as operating over capacity). Indeed, because of overcrowding, many Montana inmates are housed in the very jail that housed Betterman while he awaited sentencing. Brandt, *Correction System Overwhelmed*, *supra*. It is entirely possible that he would have served his sentence in the Butte jail anyway even if sentenced sooner, making his claim about the benefits of prison particularly speculative.

As with all inmates in his situation, it is also highly possible that Betterman received more rehabilitation more quickly in jail than he would have at prison. Because of prison overcrowding, "there is less availability of prison rehabilitative programs to meet inmate needs." Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQUENCY 360, 380 (2003). Thus, "only a small percentage [of prisoners] are receiving the benefit of extensive rehabilitation or prerelease programs." *Id.* at 361; *see also* Proclamation of California Governor, Prison Overcrowding State of

---

[5] Available at http://tinyurl.com/hne58qo.

Emergency Proclamation (October 4, 2006) ("the severe overcrowding has also substantially limited or restricted inmate movement, causing significantly reduced inmate attendance in academic, vocational, and rehabilitation programs").[6] That is particularly the case for the type of drug rehabilitation programs that the district court ordered Betterman to complete while on probation. *See* Kevin Johnson, *Prisoners face long wait for drug-rehab services*, USA Today, Dec. 4, 2012 ("Although drug offenders represent the single-largest category of prisoners in the burgeoning federal prison system, thousands wait months to begin drug education or rehabilitation because of staff shortages and limited resources").[7] And because of these limited resources, inmates serving shorter sentences and first time offenders get priority over repeat offenders serving multiple consecutive sentences, like Betterman. *See, e.g.*, Paul Hammel, *Nebraska prisons failing at rehabilitation programs, report finds*, Omaha World-Herald, Jan. 12, 2014 ("Because shorter-term inmates get priority for [mental health] programs" inmate "had to wait an extra year before taking the class").[8]

Even if inmates in local jails sometimes lack access to rehabilitation programs, the reality is that prisoners often face the same problem, and time served in prison can be "dead time" just as much as time served in jail. But that does not render an inmate's incarceration undue or oppressive. In short, neither the facts nor the

---

[6] Available at http://www.gov.ca.gov/news.php?id=4278.

[7] Available at http://tinyurl.com/pdfboam.

[8] Available at http://tinyurl.com/jgjt8l5.

law support the proposition that the comparative advantages of prison over county jail constitutes the sort of "undue and oppressive pretrial incarceration" with which the Speedy Trial Clause is concerned.

b. Speculation concerning the possibility of parole is not undue or oppressive pretrial incarceration. Adding speculation on top of speculation, Betterman contends that prolonged detention before sentencing may prevent a convicted person from satisfying rehabilitation conditions required for his early release, or from completing programs that might enhance his chances of obtaining parole. Betterman contends that this Court addressed a "similar concern" in *Smith v. Hooey*, 393 U.S. 374 (1969).

But in *Smith*, the Court was analyzing the delay in bringing a person *to trial* on a new charge when the person was already serving a sentence on a prior conviction, and explicitly tied the evil associated with such delay to his presumption of innocence. 393 U.S. at 378. Smith was being held in a federal penitentiary in Kansas when he was indicted in Texas on unrelated charges. Despite his repeated requests to be brought to trial in Texas, the state made no effort to do so, allowing *six years* to pass after indictment. The state indicated that it would not bring Smith to trial until he served out his federal sentence. The Court explained that he could potentially be prejudiced by the delay in several ways, including the fact that federal authorities could use *the pendency of another criminal charge* against him when determining his dangerousness and eligibility for release—a charge of which he had not yet been convicted and, under Texas policy, would not even

be tried for until after he was released from federal custody. *Id.* at 378; *see also id.* at 379 (discussing the purpose of minimizing anxiety and concern and indicating "there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large").

In contrast, a prisoner may legitimately face consequences if he is convicted of a second crime, such as having the duration of his original sentence "increased" (because the chances of his obtaining parole are diminished) and the conditions of his confinement "worsened" (because his dangerousness level and risk of flight are increased). A parole board's decisions concerning parole in that context, unlike the decisions discussed in *Smith*, are not based solely on a pending—and potentially unfounded—charge. Nor are they based on a pending but unresolved sentencing hearing. Rather, those parole decisions are a direct and wholly legitimate result of the defendant's new conviction. Thus, the situation in *Smith* is not at all similar to the situation presented in this case.

Speculation that a sentencing delay *may* keep someone from successfully completing rehabilitation programs, which in turn *may* foreclose the possibility of parole, cannot constitute prejudice under *Barker*. 407 U.S. at 534 (recognizing that prejudice must be "serious"); *Ewell*, 383 U.S. at 122 (rejecting claim of prejudice that was "insubstantial, speculative and premature"). The federal government does not even grant parole, and many states have abolished or strictly limited it, so in many cases it is not even an

issue. But even in states that do, "the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 11 (1979)(emphasis in original); *McDermott v. McDonald*, 24 P.3d 200, 204 (Mont. 2001) (noting that, under Montana law, "parole is a privilege and not a right"). A "mere hope" of parole is not a basis to apply the Speedy Trial Clause to sentencing delay.

Betterman's case is a good example of just how speculative this claim can be. The district court did not order Betterman to complete any particular program while in prison in either of his cases, nor did it condition his parole eligibility on his completion of any programs. The judge simply ordered him to complete a chemical dependency evaluation, a mental health assessment, and cognitive restructuring as conditions of the *probationary* portion of his sentence for domestic assault, and Betterman admittedly participated in chemical dependency treatment and mental health treatment while in jail. The parole board has discretion to determine what programs an inmate must complete before being released from prison, and whether the programs Betterman completed were sufficient. *See McDermott,* 24 P.3d at 203-05. Thus, the court-ordered conditions he references did not bear "directly on his case for early release or parole" as he claims. Pet. Br. 39.

And in any event, the time Betterman was serving was not "dead time" as described in *Barker*, where someone is sitting in jail awaiting trial. He was serving his sentence for domestic assault, which is why the district court did not credit time served against his bail

jumping conviction. JA 114. After Betterman pled guilty to bail jumping, he was going to have to serve a second prison sentence for that offense, without question, and his parole eligibility date was going to be pushed into the future.

c. Speculation concerning the possibility of concurrent sentences is not undue or oppressive pretrial incarceration. Relying again on *Smith*, Betterman contends that a defendant serving time on one sentence and awaiting sentencing on a new conviction may suffer undue and oppressive incarceration because he might lose the chance of receiving a sentence "at least partially concurrent with the one he is serving." Pet. Br. 40 (citing *Smith*, 393 U.S. at 378). Given that Texas indicated it would not even try Smith until after he had fully completed his federal prison term, this Court expressed concern that Smith would lose the possibility of concurrent sentences altogether. Under Betterman's reading of this statement, even a single day of delay between a defendant's conviction and his sentencing hearing would "prejudice" him if the court later ordered his new sentence to run concurrently with his preexisting one.

But a defendant does not have a right to concurrent sentencing, and concurrent sentences are generally not the default rule where the defendant is already serving time when he is convicted of a separate crime. *See* Mont. Code Ann. § 46-18-401. Further, the court may consider a defendant's pre-existing sentence when crafting the length of his sentence for the second conviction, thereby ameliorating any impact the delay might have had.

Finally, Betterman contends that a sentencing delay could result in undue and oppressive incarceration in extreme cases where the defendant could end up serving more time than a fair sentence would warrant. But like the interests in concurrent sentencing, that remote possibility is not the type of restraint on pretrial liberty that the Clause was meant to remedy. And in any event, it is not necessary to employ the Speedy Trial Clause outside its context when a judge could more easily craft a remedy under the Due Process Clause that fits that type of harm. *See, e.g.*, *Ray*, 578 F.3d at 202-03.

2. Pretrial Anxiety and Concern Accompanying Public Accusation Does Not Apply After Conviction.

The interest in mitigating the "anxiety and concern accompanying public accusation," *Ewell*, 383 U.S. at 120, is closely related to the interest in preventing undue and oppressive pretrial deprivations of liberty. Both are concerned with lessening the collateral consequences of public accusation on the potentially innocent. "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Marion*, 404 U.S. at 320.

Because the government needs only probable cause to bring charges against someone, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Flanagan v. United States*, 465 U.S. 259,

267 (1984) (citations omitted). The Speedy Trial Clause aims "to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. 1, 8 (1982); *see also Ray*, 578 F.3d at 198 (recognizing that the anxiety and concern relevant to the Speedy Trial Clause arise from the cloud of suspicion hovering over one who is presumptively innocent)(quotations and citations omitted). The "cloud of suspicion" takes its toll and the accused would understandably want the ordeal to last no longer than necessary.

Post-conviction delay does not implicate the same type of anxiety. Once a defendant is convicted, he is not merely accused, "living under a cloud of suspicion"—the suspicion has been confirmed and any ignominy that flows from that is deserved. The only question is what the punishment will be. That may raise a certain amount of anxiety, but it is not the type the Sixth Amendment is intended to mitigate. "The 'anxiety and concern,' . . . relevant to the Speedy Trial Clause is that of the accused, not that of the convicted." *Ray*, 578 F.3d at 198 (citing *Doggett*, 505 U.S. at 654); *see also Perez*, 793 F.2d at 257 ("[T]he anxiety of an accused [awaiting trial] is not to be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be.").

While pretrial anxiety and concern for a presumptively innocent defendant is an objective reality, claims of post-conviction anxiety are fraught with subjective and self-serving assertions. As then-judge Alito noted on the Third Circuit, "If we are willing to find significant prejudice merely because a

defendant states that he or she suffered from anxiety and distress, we might as well deem prejudice to exist in every case involving delay." *Burkett II*, 951 F.2d at 1449 (Alito, J., dissenting).

Betterman's anxiety claim illustrates the point. He based his claim solely on a snippet in his motion to dismiss: "defendant *suggests* that he has undergone concern and anxiety over his future." JA 68 (emphasis added). That was it. He offered nothing more until four months later when he filed an affidavit in support of a motion to reconsider the denial of his speedy sentencing claim. JA 88, ¶9. And even then he only supported it with a factually-bare statement that he had suffered anxiety because of the uncertainty of his sentence. *Id.*

Moreover, Betterman's argument that a defendant experiences anxiety because "substantial legal and factual matters are often resolved at sentencing hearings," Pet. Br. 45, ignores that the same could be said about a prisoner who has been sentenced but has uncertainty about the outcome of his appeal, parole hearing, habeas petition, or even his petition in this Court. But the Sixth Amendment rights of the accused have no application to a convicted person's fear and anxiety regarding the uncertainty of his sentence after guilt has been determined.

3. Impairment of an Accused's Ability to Defend Himself Does Not Have the Same Application Once Trial Is Over.

This Court has held that the Speedy Trial Clause has a role to play in ensuring that the accused's trial is fair and likely to produce a reliable and valid

determination of his guilt or innocence. *See Barker*, 407 U.S. at 532 (discussing fairness of the proceeding); *Doggett*, 505 U.S. at 655 (discussing reliability of result). Betterman contends that modern plea bargaining and sentencing practices render sentencing hearings "minitrials" and that the same concerns for fairness and reliability are present when a convicted person's sentencing is unduly delayed.

Betterman's description of modern sentencing practices is skewed. In reality, the prevalence of guilty pleas means that many sentencing proceedings are just like Betterman's: no witnesses are called except for the author of the presentence investigation report and, perhaps, the convicted defendant, and no evidence is presented beyond the presentence investigation report itself. Because the parties have already agreed on an appropriate sentence, or an appropriate range from which the judge can choose, it is very unlikely that the sentencing hearing will resolve any factual issues whatsoever. Rather, in most cases the judge will simply determine the appropriate disposition based on the agreed upon facts and the plea agreement.

But even in cases where there may be a factual issue, sentencing fulfills a very different purpose by a very different means than trial. "[T]he criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt." *Estes v. Texas*, 381 U.S. 532, 565 (1965) (Warren, C.J., concurring). The rules of criminal procedure, the rules of evidence, and constitutional rights like the Confrontation Clause strictly guard what evidence the jury may consider relevant to the particular charged offense.

"A sentencing judge, however, is not confined to the narrow issue of guilt." *Williams v. New York*, 337 U.S. 241, 247 (1949). Indeed "in contrast to the guilt stage of trial, the judge's task in sentencing is to determine, 'within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt' has been resolved." *Apprendi*, 530 U.S. at 481-82 (quoting *Williams*, 337 U.S. at 247). Thus, the "sentencing process" is necessarily "less exacting than the process of establishing guilt." *Nichols v. United States*, 511 U.S. 738, 747 (1994). There is no right to a jury determination of sentence, *McMillan*, 477 U.S. at 93; the rules of evidence generally do not apply, *see, e.g.*, Fed. R. Evid. 1101(d)(3); and "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." 477 U.S. at 91.

As discussed above, "[f]rom the beginning of the Republic" courts have "been entrusted with wide sentencing discretion." *Apprendi*, 530 U.S. at 482 n.9 (quoting Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9-10 (1998)); *see also Williams*, 337 U.S. at 246 ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."). In exercising that discretion, the judge can, and almost always does, consider the defendant's character and past criminal history, evidence that may not be available to the jury when deciding his guilt or innocence. In short, sentencing is not the same as a

trial, and the fairness of sentencing is not affected by delays in the process in the same way "[W]hen all that remains of a case is the imposition of sentence, the danger of losing witnesses or other evidence needed to mount an adequate defense is minimized, if not eliminated completely." *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006) (rejecting speedy trial claim in resentencing case).

Factual issues at sentencing are particularly limited after this Court's decision in *Apprendi*. Now, other than the fact of a prior conviction, any fact that must be proven for a higher sentence is an element of the crime that the government must prove to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Thus, an entire category of facts are no longer even addressed at sentencing.

Moreover, Betterman's argument that delay will "impair the ability of an accused to defend himself" in sentencing proceedings when he is "incarcerated" is curious. Pet. Br. at 44 (quoting *Smith*, 393 U.S. at 379). As noted above, once someone is convicted, rather than merely accused, there is a presumption that he will be detained pending sentencing. But to the extent the point is relevant at all, defendants are likely better off mounting a "vigorous . . . sentencing defense," Pet. Br. at 44, from county jail, rather than at a distance in the higher security prison system. At county jail, attorneys and witnesses are closer and have much easier access to the convicted, which is better than being "[c]onfined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place." *Smith*, 393 U.S. at 379.

Finally, Betterman's argument that "sentencing delay could prejudice both the State and the defendant if a retrial should be ordered on appeal" reveals the breadth of his position and the consequences of extending the speedy trial right beyond the adjudication of guilt stage. *See* Pet. Br. 44 (citation omitted). Betterman's argument would not preclude extending speedy trial claims through appeal and re-sentencing. It takes little imagination to see what the stable of creative defendants and vigorous defense counsel could do with that. Federal and state dockets would be flooded with limitless speedy trial claims, spanning the entire criminal process. And if appeal and resentencing are part of the equation, what is the relevant timeframe? Does it begin at arrest, conviction, sentencing, or sometime later, or some combination of all of them?

Due process is the answer there, as it is here. As discussed below, it protects against "undue delay," *MacDonald*, 456 U.S. at 7, in post-trial proceedings without wrenching the Speedy Trial Clause from its textual and historic confines. A defendant can raise any claim of prejudice that he may have in any post-trial situation, and the court can fashion a remedy appropriate to the harm. The Speedy Trial Clause, however, should be limited to the pretrial interests of the "accused" to safeguard the purposes for which it was intended.

E. Dismissal Is a Unique Remedy, Which Confirms the Speedy Trial Clause's Limited Application to Pretrial Delay.

The scope of the speedy trial right is also apparent from the "unsatisfactorily severe," remedy of dismissal, which the Court has definitively held is the only remedy for a Speedy Trial Clause violation. *Barker*, 407 U.S. at 522. Dismissal makes sense when applied to the harms associated with public accusation prior to trial. Prolonged pretrial delay may impact a defendant's ability to defend himself at trial and it may unjustifiably deprive a presumptively innocent person of his liberty "In light of the policies that underlie the right to a speedy trial," there is arguably no other remedy that would be adequate in that situation. *Strunk*, 412 U.S. at 440.

But dismissal "is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy." *Barker*, 407 U.S. at 522. In Betterman's case, as in all sentencing delay cases, it means even more: it means a defendant who has been duly convicted and can be punished for that crime could nonetheless go free simply because of a backlogged case docket. Even Betterman concedes that dismissing his conviction based on the delay in sentencing would be intolerable. Pet. Br. 49. And he is right.

The Court has squarely "rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing sentence.'" *Bozza v. United States*, 330 U.S. 160, 166 (1947) (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza*, 330 U.S. at 166; *see also Pollard v. United States*, 352 U.S. 354, 362 (1957) ("Error in the course of a prosecution resulting in a conviction calls for correction of the error, not the release of the accused.").

Thus, to the extent that *Strunk* supports vacating a sentence and conviction due to sentencing delay, the remedy is in serious tension with the principles expressed in *Bozza*. But *Strunk* and *Bozza* "are not in tension so long as the Speedy Trial Clause is not read to extend to sentencing proceedings." *Ray*, 578 F.3d at 194.

For this reason, those lower courts that have (erroneously) extended the speedy trial right to sentencing have struggled to find a suitable remedy. Some courts have found that vacating the sentence and judgment is the only possible remedy for a Speedy Trial Clause violation under *Strunk*. *See Jolly v. State*, 189 S.W.3d 40, 49 (Ark. 2004) (vacating the judgment and the sentence for "speedy sentencing" violation); *Trotter v. State*, 554 So.2d 313, 319 (Miss. 1989) (vacating judgment and sentence); *accord Gould*, 672 F.3d at 934 n.2 (recognizing that absent statutory authority, the only remedy for speedy sentencing violation is dismissing the charge).

Other courts have, despite this Court's unambiguous holdings, applied a remedy short of vacating the judgment. *See, e.g.*, *United States v. Washington*, No. 14-10623, 2015 WL 5607653 (5th Cir. Sept. 24, 2015) (vacating the remaining portion prisoner owed in restitution); *Juarez-Casares v. United States*, 496 F.2d 190, 193 (5th Cir. 1974) (vacating the sentence but not the conviction); *see also Burkett II*, 951 F.2d at 1447-48 (1991) (reducing sentence based on statutory authority, but recognizing difficulty in crafting remedy for sentencing delay). Betterman likewise suggests that the remedy under the Speedy Trial Clause can be "flexible." However, the Court in *Strunk* rejected the proposed flexible remedy of crediting the defendant for time served. 412 U.S. at 438-39. The Court noted that while the standards that Barker prescribes for determining whether the Sixth Amendment has been violated may be flexible, the remedy is not, and "dismissal must remain, as *Barker* noted, 'the only possible remedy.'" *Id.* at 440 (quoting *Barker*, 407 U.S. at 522).

All told, the remedy of dismissal does not fit sentencing delay because sentencing delay is not the type of harm that the Speedy Trial Clause was meant to address. As Judge Gorsuch noted in a different Sixth Amendment context, "examination of the remedial question . . . serves only to underscore one thing: the absence of anything in need of remedying in the first place." *Williams v. Jones*, 571 F.3d 1086, 1109 (10th Cir. 2009) (Gorsuch, J., dissenting).

II. The Due Process Clause, Statutory Provisions, and Rules of Criminal Procedure Adequately Protect the Right to Timely Sentencing.

Limiting the Speedy Trial Clause to its proper pretrial context does not leave a defendant sentenced in an untimely manner without recourse. Nor does it minimize concerns regarding the potentially deleterious effects of untimely sentencing proceedings. *See Ray*, 578 F.3d at 198. But there are other more appropriate vehicles for addressing those concerns that do not require this Court to "wrench the Sixth Amendment from its proper context." *Marion*, 404 U.S. at 321-22.

For example, various state and federal laws prohibit unreasonable sentencing delays. The federal rules of criminal procedure provide that a "court must impose sentence without unnecessary delay." Fed. R. Crim. P. 32(b)(1); *see, e.g.*, *Pollard*, 352 U.S. at 362 (analyzing sentencing delay under Rule 32(b)'s precursor). Montana statutes provide similar protection, although Betterman failed to raise them as a basis for his claim. *See* Pet. App. 16a-17a. A court can also fashion a remedy provided by sentencing discretion itself, by crafting a sentence that takes presentence delay into account and crediting time served or by reducing the total term of imprisonment to be served.

In addition, this Court has already held that "the Due Process Clause has a limited role to play in protecting against oppressive delay" in criminal proceedings. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). The Court held in *Lovasco* that the Due Process Clause provides a constitutional backstop for

periods of truly excessive and prejudicial pre-indictment delay not covered by the Speedy Trial Clause. There is no reason the same analysis would not apply to a period of oppressive post-conviction delay in sentencing a defendant. *See* Pet. App. 15a-16a. In other words, the Due Process Clause bookends the rights of the accused before trial and the rights of the convicted after trial.

Applying the Due Process Clause rather than the Speedy Trial Clause takes into account the differences between the accused and convicted, and would provide a more flexible remedy that could be tailored to the prejudice the defendant actually suffers. *See Ray*, 578 F.3d at 202 ("After a due process violation has occurred, courts endeavor to fashion relief that counteracts the prejudice caused by the violation.").

Placing the constitutional right to timely sentencing under the Due Process Clause rather than the Sixth Amendment matters for several reasons. First, detaching the Speedy Trial Clause from its textual and historical meaning to bring the accused to trial speedily will necessarily change the right itself, and will require the Court to backtrack from decades of precedent explaining the right. Second, rooting what are essentially due process rights in the Sixth Amendment risks diluting the Sixth Amendment and creating confusion about the Due Process Clause. *See, e.g.*, Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. Pa. J. Const. L. 487, 490 (2009) (arguing that "by improperly locating expansive procedural protections in the rules of the Sixth Amendment as opposed to deriving the same rights from the general principle of Due Process, ironically

open[s] the door to possible restrictive reading of the Sixth Amendment[.]"). And third, it creates significant problems with this Court's precedent on what the proper remedy is for a speedy trial violation.

Statutory and due process remedies provide defendants ample security for sentencing delays, and they do so without requiring the Court to design a new test and a new remedy for the same claims under the Sixth Amendment. Perhaps more importantly, relying on these remedies avoids skewing the purposes for the Speedy Trial Clause, which this Court has consistently described for the last sixty years.

III. If the Speedy Trial Clause Applies to Sentencing Delay, Showing Substantial and Demonstrable Prejudice Should Be Required.

Even if this Court finds that the Speedy Trial Clause applies to sentencing delay, it should require that a defendant show substantial and demonstrable prejudice before he is entitled to relief. As this Court explained, prejudice "should be assessed in the light of the interests of defendants which the speedy right was designed to protect." *Barker*, 407 U.S. at 532 (citing speedy trial interests identified in *Ewell*, *Smith*, and *Klopfer*); *see also Doggett*, 505 U.S. at 670 (Thomas, J., dissenting) ("[A]pplication of *Barker* presupposes that an accused has been subjected to the evils against which the Speedy Trial Clause is directed[.]").

Betterman's argument that no affirmative showing of prejudice should be required for speedy sentencing claims ignores the significant differences between the accused and the convicted. Pet. Br. at 48. As discussed

above, the interests that the Speedy Trial Clause was meant to protect fade or disappear at conviction. The accused has had his day in court and is no longer potentially innocent, but instead guilty, and society's interests in public safety, deterrence, and retribution take the forefront. Thus, at the very least, any analysis of post-conviction delay should take account of that significant change in circumstances and require that the defendant show substantial and demonstrable prejudice from the delay.

That is consistent with how lower courts have approached sentencing delay cases. For example, the Tenth Circuit was the first court to directly confront whether the *Barker* factors required a showing of prejudice at sentencing. The court recognized that the interests protected by the Speedy Trial Clause largely "diminish or disappear altogether once there has been a conviction" while "the rights of society proportionately increase." *Perez*, 793 F.2d at 256 (citations omitted). Therefore, "the prejudice claimed by the defendant must be substantial and demonstrable." *Id.* Most lower courts have followed the Tenth Circuit's approach.[9]

---

[9] *See, e.g.*, *United States v. Westmoreland*, 712 F.3d 1066, 1077 (7th Cir. 2013) ("Although Westmoreland is able to satisfy some of the factors with respect to his motion for a new trial, he cannot show prejudice—which, because he was convicted, must be 'substantial and demonstrable.'") (citations omitted); *United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006) (requiring "[p]ost-conviction prejudice" to be "substantial and demonstrable"); *United States v. Nelson-Rodriguez*, 319 F.3d 12, 61 (1st Cir. 2003) (reiterating that "courts have great reluctance to find a speedy trial deprivation where there is no substantial and demonstrable prejudice"); *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir. 1987) (noting

Betterman's position also makes fashioning a remedy impossible, which is probably why he failed to propose any manageable standard for remedying sentencing delay. While conceding that dismissal is inappropriate in this context, he declined to identify what the appropriate remedy should be. Without a showing of substantial and demonstrable prejudice, any remedy would be arbitrary because the court would have nothing concrete to cure. *Burkett*, 826 F.2d at 1233 (Garth, J., dissenting) ("in the absence of any real finding of prejudice, it is impossible to know what specific needs require remediation").

Thus, if this Court holds that the Speedy Trial Clause applies to sentencing delay, it should clarify that a defendant must show substantial and demonstrable prejudice in order to state a constitutional claim, and that the remedy should be carefully tailored to cure that prejudice.

---

that it would be the "rarest of circumstances" that a defendant would not have to show prejudice in a post-trial setting)(citation omitted); *Hoang v. People*, 323 P.3d 780, 790 (Colo. 2014) (requiring showing of actual prejudice in post-trial challenges under *Barker* because the "appellant no longer receives the presumption of innocence after conviction" and "society's interests in punishment and rehabilitation increase"); *Bodnari v. State*, 839 A.2d 665 (Del. 2003) (requiring a "substantial and demonstrable" showing of prejudice in post-trial *Barker* analysis); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002) ("in a post-conviction situation the showing of prejudice dominates *Barker*'s four-part balancing test").

IV. The State Courts Were Correct That Betterman Did Not Establish a Violation of His Right to a Speedy Trial.

Even under the modified *Barker* analysis that Betterman proposes, none of the four *Barker* factors—length of delay, reason for the delay, defendant's assertion of his right, and prejudice—supports his speedy sentencing claim. *Barker*, 407 U.S. at 530.

1. As to the first factor, the length of delay, the Court has recognized that "justice is supposed to be swift but deliberate." *Barker*, 407 U.S. at 521. The protection afforded by the Speedy Trial Clause, therefore, "is consistent with delays," *Beavers v. Haubert*, 198 U.S. 77, 87 (1905), which often promote informed decision making and discourage the arbitrary exercise of power. 4 BLACKSTONE at 343-44 (explaining delays and inconveniences associated with the criminal justice process are justifiable as "the price that all free nations must pay for their liberty in more substantial matters."). While the Montana Supreme Court recognized that the fourteen-month delay was unacceptable, and thus long enough to trigger a speedy trial inquiry, courts have rejected speedy sentencing claims where the sentencing delay was considerably longer. *See, e.g.*, *Pollard*, 352 U.S. at 361 (24 months); *United States v. Tortorello*, 391 F.2d 587, 588-89 (2d. Cir. 1968) (29 months). Indeed, in those cases in which courts have found unconstitutional sentencing delays, the delay far exceeded fourteen months. *See, e.g.*, *Juarez-Casares*, 496 F.2d at 191, 193 (31 months); *Harris v. State*, 956 A.2d 1273, 1276 (Del. 2008) (6 ½ years); *Jolly*, 189 S.W.3d at 49 (6 years). *See also*

United States v. Campbell, 531 F.2d 1333, 1333 (5th Cir. 1976) (6-year delay; case remanded for consideration of prejudice allegations); *United States v. James*, 459 F.2d 443, 444-45 (5th Cir. 1972) (3-year delay unreasonable, but not unconstitutional because no prejudice); *Brady v. Superintendent*, 443 F.2d 1307, 1309 (4th Cir. 1971) (8-year delay excessive, but not unconstitutional).

2. Nor does the second factor, the reason for the delay, aid Betterman. In this case he made a strategic decision to challenge the persistent felony offender notice on a questionable technical ground. He later made the strategic decision to file a motion to dismiss the bail jumping charge *on the date that he otherwise would have been sentenced by the court*. These decisions directly resulted in delays in his sentencing that otherwise would not have occurred. And while not all of the delay was Betterman's fault, he acknowledges that none of it was the prosecutor's fault, and that much of the delay was due to the court's workload.

3. Turning to the third factor, Betterman's claim that he "repeatedly . . . asserted his right to be sentenced promptly" on his bail jumping conviction is simply not accurate. Pet. Br. at 13, 50. "[T]he defendant's burden of showing he desired a speedy trial is not satisfied merely by moving to dismiss after the delay has already occurred." *Gould*, 672 F.3d at 938 (citation and internal quotation omitted). In fact, throughout this case Betterman did little to press his right. He consented to delay and did not take affirmative steps to expedite his sentencing. The district court correctly found under the circumstances that Betterman did "not demonstrate a persistent or

sincere desire to assert his speedy trial right." Pet. App. 34a. *See Barker*, 407 U.S. at 536 (refusing to find a violation "on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial.").

4. Finally, Betterman did not support his claim that he was prejudiced by the delay. Even in the context of pretrial delays, this Court has rejected claims of prejudice that are "insubstantial, speculative and premature." *Ewell*, 383 U.S. at 122; *see also Barker*, 407 U.S. at 534 (claim of prejudice must be "serious"). Post-trial claims of prejudice present a much tougher case and failure to strongly support them "is nearly fatal to a speedy trial claim." *Gould*, 672 F.3d at 939. As the Montana Supreme Court properly concluded, Betterman's claim of prejudice was based on speculation in the form of unsworn statements of counsel and factually unsupported statements of Betterman, which is likely why he is now asking this Court to require only the sheerest of speculation to satisfy the prejudice prong. Pet. Br. 51; Pet. Cert. 17-18.

And although "[t]here is no dispute" that rehabilitative programs are offered in Montana's prisons, the record does not indisputably show those programs would have been "available" to Betterman "had he been promptly sentenced." Pet. Br. 51. As discussed above, even if Betterman had been sentenced immediately he may have continued to reside at the local jail, subject to the exact same conditions. And even if Betterman had been transferred to prison immediately, there was no guarantee that the rehabilitation programs he sought would have been

available. Nor was it certain, or, indeed, even likely, given Betterman's history, that he would have successfully completed these programs, or that his prospects for early release were in any way affected by the delay in his sentencing. His prejudice claim is, thus, speculative on multiple levels.

Betterman similarly provided no evidence to support his claim that he suffered anxiety because of the delay in his sentencing. To the contrary, it appears Betterman suffered from anxiety—and received medical treatment for that anxiety—long before he was ever charged with bail jumping. PSI at 5-6.

If anything, it appears that the delay in Betterman's sentencing may have benefited, rather than prejudiced him. At his sentencing hearing, Betterman was able to point to his long period of forced sobriety and the numerous rehabilitation and treatment programs in which he participated during his stay in the county jail as evidence that he was a "changed" man. JA 98, 101-02. Although the district court did not accept his invitation to impose a fully suspended sentence, it imposed a prison term considerably less than what the presentence investigation report recommended by suspending four years of his term. The court also chose not to designate Betterman as a persistent felony offender, a designation that would have collateral consequences were he to be convicted of another felony in the future.

In sum, none of the *Barker* factors weigh heavily in Betterman's favor. Thus, the delay in sentencing Betterman did not violate the Sixth Amendment, to the extent it applies at all.

CONCLUSION

This Court should affirm the decision of the Montana Supreme Court.

Respectfully submitted,

TIMOTHY C. FOX
Montana Attorney General
DALE SCHOWENGERDT
Solicitor General
Counsel of Record
C. MARK FOWLER
Appellate Bureau Chief
TAMMY A. HINDERMAN
JONATHAN M. KRAUSS
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
DaleS@mt.gov
(406) 444-2026

Counsel for Respondent

APPENDIX

APPENDIX

TABLE OF CONTENTS

Relevant Dates In Betterman Prosecution . . . App. 1

APPENDIX

Relevant Dates In Betterman Prosecution

March 14, 2011	Betterman arrested for domestic assault; posted bond. JA 11; PSI at 3.
December 8 to 9, 2011	Betterman failed to appear for sentencing hearings on domestic assault conviction; bench warrant issued. JA 11.
February 9, 2012	Betterman turned himself in to Butte-Silver Bow Detention Center. JA 11.
March 5, 2012	State filed complaint in justice court charging bail jumping; $10,000 bail imposed. JA 6-9.
March 15, 2012	Betterman sentenced for felony domestic assault in. JA 26; PSI 3-4.
April 2, 2012	State filed Information in district court charging bail jumping. JA 15-16.

April 19, 2012	Arraignment and guilty plea; judge ordered presentence investigation report. JA 19-20.
	State filed notice of intent to seek persistent felony offender (PFO) designation. JA 25-28.
April 27, 2012	Betterman filed motion to strike PFO notice. JA 29-34.
May 11, 2012	District court granted State's unopposed motion for extension of time to respond to motion to strike PFO Notice. JA 39-40.
June 13, 2012	State filed response to motion to strike PFO Notice. JA 41-48.
June 28, 2012	Hearing on motion to strike PFO Notice. JA 49-52.
October 10, 2012	Presentence investigation report completed.
November 27, 2012	Order denying motion to strike PFO. JA 53-60.
December 27, 2012	Order setting sentencing hearing for January 17, 2013. JA 61-62.

January 17, 2013	First sentencing hearing. JA 69-72.
January 17, 2013	Betterman filed motion to dismiss for denial of speedy trial right based on sentencing delay. JA 63-68.
January 29, 2013	State filed response to motion to dismiss. JA 73-83.
April 29, 2013	Order denying motion to dismiss. Pet. App. 26a-37a.
May 6, 2013	Betterman filed motion to reconsider, supplementing motion with affidavit. JA 84-90.
June 24, 2013	Order denying motion to reconsider. Pet. App. 24-25.
June 27, 2013	Second sentencing hearing. JA 91-111.
July 9, 2013	Judgment entered. JA 112-18.